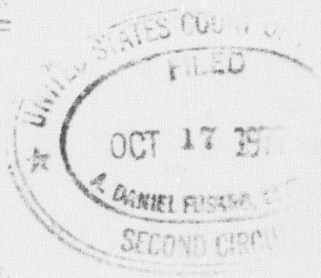
***United States Court of Appeals***

***for the Second Circuit***

# APPELLEE'S BRIEF

# 77-7232

*To be argued by*
SUSAN S. BELKIN




# United States Court of Appeals

FOR THE SECOND CIRCUIT

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HERBERT FEDERMAN, et al.,

*Plaintiffs,*

—against—

EMPIRE FIRE AND MARINE INSURANCE COMPANY, et al.,

*Defendants-Appellees,*

and

STUART C. GOLDBERG and JACOB ASCHKENASY,

*Additional Defendants on Cross-Claims,*

STUART C. GOLDBERG,

*Additional Defendant on Cross-Claims,*

*Appellant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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## EMPIRE DEFENDANTS-APPELLEES' BRIEF

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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HERBERT FEDERMAN, et al.,

Plaintiffs,

-against-

EMPIRE FIRE AND MARINE INSURANCE COMPANY, et al.,

Defendants-Appellees,

-and-

STUART C. GOLDBERG and JACOB ASCHKENASY,

Additional Defendants on Cross-Claims,

STUART C. GOLDBERG,

Additional Defendant on Cross-Claims-Appellant

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

# EMPIRE DEFENDANTS-APPELLEES' BRIEF

## Preliminary Statement

This is an appeal by appellant Stuart C. Goldberg ("Goldberg") from an order of the United States District Court for the Southern District of New York (MacMahon J.), entered on April 12, 1977, which denied appellees' motions to dismiss without

prejudice and retained jurisdiction over the case while suspending all further proceedings in the federal court pending the commencement and final determination of an action or actions in state court encompassing all of the state claims, cross-claims and counterclaims of the parties alleged in this action. Goldberg is also appealing an order of the United States District Court for the Southern District of New York (MacMahon J.), entered on March 29, 1976, which denied Goldberg's motion for an order of recusal and transfer of the case to another judge.

## Issues Presented

1) Did the district court abuse its discretion by denying appellees' motions to dismiss Goldberg's cross-claims and counterclaims without prejudice and retaining jurisdiction over the case while suspending all further proceedings in the federal court pending the commencement and final determination of an action or actions in state court encompassing all of the state claims, cross-claims and counterclaims of the parties alleged in this action?

2) Did the district court abuse its discretion by denying Goldberg's motion for an order of recusal and transfer of the case to another judge?

## STATEMENT OF THE CASE

On May 2, 1973, plaintiffs Dietrich Meyerhofer and Herbert Federman, on behalf of themselves and all similarly situated purchasers of the common stock of Empire Fire and Marine Insurance Company ("Empire"), filed the original complaint in this consolidated action, Meyerhofer v. Empire Fire and Marine Ins. Co., 73 Civ. 1940 ("Meyerhofer action") (1a).* It alleged various claims under the Securities Exchange Act of 1934 on behalf of a purported class in excess of 5,000 members. The claims related to a registration statement and prospectus of Empire which were filed with the Securities and Exchange Commission and became effective on May 31, 1972 in connection with a public offering of 500,000 shares of Empire's common stock.

The defendants named in the Meyerhofer action included Empire, various of its officers and directors, the law firm of Sitomer, Sitomer & Porges ("Sitomer firm"), which had represented Empire in connection with the offering, each of the firm's general partners and Goldberg who was alleged to have been a "limited partner" in the Sitomer firm.

* Numbers in parentheses followed by an "a" refer to pages of the Appendix and Supplemental Appendix.

On August 23, 1973 the district court dismissed the Meyerhofer action without prejudice on the ground that plaintiffs' attorneys had violated Canons 4 and 9 of the Code of Professional Responsibility by holding a number of discussions with Goldberg subsequent to commencement of the litigation (1a-2a, 67a-80a). However, the district court stated that "[t]he questions presented are close. Both Goldberg and counsel consulted as to the propriety of their meetings and the disclosures, and we think they acted in good faith" (77a). The district court also specifically stated that "we do not consider the propriety of Goldberg's disclosures to the SEC" (80a).

On June 10, 1974, this Court reversed that order to the extent that it had dismissed the Meyerhofer action without prejudice and had enjoined plaintiffs' attorneys from acting as counsel in the action, but affirmed the order to the extent that it prohibited Goldberg from acting as a party or attorney for a party in the litigation or from disclosing material information except on discovery or at trial. Meyerhofer v. Empire Fire and Marine Ins. Co., 497 F.2d 1190 (2d Cir.), cert. denied, 419 U.S. 998 (1974) (2a, 81a-87a).

On October 23, 1973, while the appeal to this Court in the Meyerhofer action was pending, plaintiffs instituted a second action in the district court asserting essentially the same claims as had been asserted in the Meyerhofer action, Federman v. Empire Fire and Marine Ins. Co., 73 Civ. 4516

("Federman action") (6a-15a). Specifically, plaintiffs alleged violations of Sections 11 and 12 of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934 (6a-15a). Goldberg was not named as a defendant in the Federman action.

On March 27, 1974, the Empire defendants served their answer and cross-claims in the Federman action (16a-29a). In addition to various denials and affirmative defenses to plaintiffs' claims, the answer set forth five cross-claims (24a-28a). The first four cross-claims were asserted jointly and severally against the Sitomer firm, its general partners (Alvin L. Sitomer, Stephen J. Sitomer and Robert E. Porges), Goldberg and Jacob Aschkenasy ("Aschkenasy"), an associate of the firm whose name appeared on the front cover of the Empire registration statement. The fifth cross-claim was asserted solely against the Sitomer firm. Since Goldberg and Aschkenasy were not then parties to the litigation, they were brought into the action, pursuant to Rule 13(h) of the Federal Rules of Civil Procedure, as additional defendants on the Empire defendants' cross-claims (24a-28a).

In substance, the first and second cross-claims of the Empire defendants alleged their reliance on the Sitomer firm and Messrs. Sitomer, Porges, Goldberg and Aschkenasy, as lawyers working on the Empire offering, to ensure the legal sufficiency and completeness of the Empire registration statement. It was further alleged that if the Empire defendants incurred liability to plaintiffs or their class, such liability would be the result of negligence and malpractice on the part of the cross-defendants in failing to ensure that the registration statement complied with applicable legal requirements, thereby entitling the Empire defen-

dants to indemnification and contribution (24a-27a). The third and fourth cross-claims sought reimbursement for all liabilities and expenses, including attorneys' fees, incurred as a result of the alleged negligence and malpractice of the cross-defendants (27a-28a). The fifth cross-claim sought a refund of all legal fees paid to the Sitomer firm with respect to any services as to which a finding of negligence or malpractice were made (28a).

On May 27, 1974, Goldberg served his initial answer to the Empire cross-claims (30a-42a). In addition to various denials and sixteen affirmative defenses, this answer asserted three cross-claims (39a-40a). The first cross-claim was asserted against the Sitomer firm and its partners and sought indemnification, under a written indemnification agreement, for any liability incurred by Goldberg on the Empire cross-claims. The second cross-claim was asserted against the Sitomer firm, its partners and Aschkenasy and sought indemnification on the alternative theory that any liability to the Empire defendants on Goldberg's part would be the result of negligence by the firm, its partners or Aschkenasy. The third cross-claim demanded contribution in the event of a recovery by the Empire defendants. Goldberg's initial answer, however, asserted no affirmative claims of any kind against Empire or any of the Empire defendants.

On June 16, 1974, Goldberg served, without leave of the district court, an "amended" answer, the first forty paragraphs of which are identical to his initial answer (43a-58a). Paragraphs 41 through 44 of Goldberg's amended answer asserted, for the first time, a counterclaim against the Empire defendants for alleged damage to his reputation, loss of employment and

counsel fees (55a-56a).* Goldberg's counterclaim against the Empire defendants read, in its entirety, as follows:

> "AS AND FOR A COUNTER-CLAIM AGAINST DEFENDANTS EMPIRE, GARY O. GROSS, YALE J. KAPLAN, ROBERT A. PHILLIPS, FRANCIS J. KRATKY, NICK LALICH, LESTER C. SWICK AND M. M. JENNINGS, JR.

41. Upon information and belief, defendant Empire Fire and Marine Insurance Company ("the Company") is, and was at all times hereinafter mentioned, a corporation organized and existing under the laws of the State of Nebraska.

42. Upon information and belief, defendants Gary O. Gross, Yale J. Kaplan, Robert A. Phillips, Francis J. Kratky, Nick Lalich, Lester C. Swick and M.M. Jennings, Jr. (hereinafter "the Empire directors") were directors of Empire at all times relevant hereto.

43. Upon information and belief, the Company and the Empire directors were at all times aware of the arrangements between the Company and the Sitomer firm and the omissions from the Empire registration statement and prospectus alleged in paragraph 7, 17 and 18 of the complaint, and of the materiality of such arrangements and omissions, and withheld knowledge of such matters from Goldberg, in breach of their duty to deal with him fairly and honestly, and without negligence on his part.

44. As a result of the foregoing, it has been made to appear, contrary to the truth, that Goldberg was a participant in the wrongs alleged in the Complaint, and Goldberg has thereby been caused to suffer damage to his reputation as a lawyer in an amount not less than $850,000, as well as by loss of employment, in an amount of at least $16,875, and by being required to incur counsel fees, in an amount which will exceed $15,000."

The Empire defendants reply to Goldberg's counterclaim was served on June 25, 1974 (59a-60a).

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* In paragraphs 45 through 48 of his amended answer Goldberg also asserted the identical claim against the Sitomer firm, its partners and Aschkenasy (56a).

During Goldberg's deposition concerning his counterclaim and cross-claims, Goldberg indicated that he intended to amend his amended answer to add counterclaims and cross-claims against the defendants for "medical expenses" including alleged damages for treatments for asthma and psychiatric fees (Goldberg depo. pp. 1208-1211).*

On September 30, 1974, on motion of the Empire defendants, the district court dismissed plaintiffs' claim for rescission under Section 12 of the 1933 Act and simultaneously granted plaintiffs' motion for class determination. By stipulation, so ordered by the district court on December 30, 1974, the Meyerhofer and Federman actions were consolidated for all purposes, with all pleadings, proceedings and orders previously had in the Federman action to apply to and to govern the consolidated action (2a).

On August 22, 1975 all parties to the action other than Goldberg entered into a stipulation of settlement under which all claims were settled except for the claims by and against Goldberg. Pursuant to this agreement the Sitomer firm agreed to pay $625,000 and Empire agreed to pay $160,000 to a class settlement fund administered by plaintiffs' counsel. The

* The complete transcript of Goldberg's deposition was filed in the district court on April 1, 1976 and was not transmitted to this Court as part of the Record on Appeal.

settlement was approved by the district court on January 16, 1976 (2a, 88a-105a).

On March 19, 1976, Goldberg moved for an order of recusal and transfer of this case to another judge (109a-110a). On March 29, 1976 after oral argument on the motion the district court denied Goldberg's motion (4a).

On March 19, 1976, the Empire defendants moved pursuant to Rules 12(c) and 12(h)(2) of the Federal Rules of Civil Procedure for judgment on the pleadings dismissing the counterclaim asserted against them in the amended answer of Goldberg on the ground that the counterclaim failed to state a claim upon which relief can be granted (186a-187a). The Empire defendants alleged that Goldberg's claim for general damages based on alleged injury to his reputation and his claim for alleged loss of employment is deficient as a matter of law under New York law; that Goldberg's claim for counsel fees was also deficient as a matter of law under New York law; that Goldberg's counterclaim was based almost entirely on matters which are legally privileged; that even under Goldberg's version of the facts causation was lacking as a matter of law under New York law; and that under New York law Goldberg could not predicate a claim for injury to reputation on publications which are not defamatory in content.

On December 3, 1976, the district court dismissed Goldberg's counterclaim against the Empire defendants, with leave

to amend (421a). In his memorandum opinion Judge MacMahon stated:

> "Addressing not the argumentative statements and conclusions in the affidavits, memoranda and other matter presented but the face of the amended answer, we find that it fails to allege either any intentional or negligent act, omission or conduct on the part of the defendants named in either the counterclaim or cross-claim which inflicted causally-connected injuries upon Goldberg. Absent such an allegation, additional defendant Goldberg's reliance on the cases involving non-conventional torts is misplaced. If Goldberg had a claim for non-conventional tort, he ought to be able to state it so that the parties and the court know what it is" (421a).

On December 22, 1976, Goldberg's counsel served a 24-page "Amendment to Amended Answer of Additional Defendant Stuart Charles Goldberg" (149a-174a). In this document Goldberg in lieu of his prior 4-paragraph counterclaim, asserted two counterclaims against the Empire defendants,* one for alleged "injurious involvement" encompassing the same claims asserted in the dismissed pleading,adding only Goldberg's alleged "medical" expenses and a second counterclaim which adds nothing new of a factual nature and in effect, simply affixes the label of "fraud" (149a-167a).** Goldberg's allegations with respect to alleged mental and physical suffering and

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* Goldberg dropped the following previously named Empire defendants since he apparently had no basis for a claim against them: Robert A. Phillips, Francis J. Kratky, Nick Lalich, Lester C. Swick and M.M. Jennings (149a).

** Goldberg also alleged two cross-claims against the Sitomer firm for breach of warranty and fraud.

"medical expenses", including psychiatric consultations are discussed, infra at pp. 26-27.

On January 4, 1977, the Empire defendants moved pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for an order dismissing the first and second counterclaims asserted against them on the ground that each of those counterclaims failed to state a claim upon which relief could be granted (422a-423a). The Empire defendants alleged that both the first counterclaim for "injurious involvement" and the second counterclaim for "fraud" are insufficient as a matter of law.

On April 12, 1977, after reviewing the chronology of the case and the substance of Goldberg's counterclaims and cross-claims, the district court found that Goldberg's claims for fraud, breach of warranty and a non-conventional tort called "injurious involvement" presented issues of state law without precedent (180a-181a). In addition, the court stated that "even if we were convinced that plaintiff has stated a claim for relief for a non-conventional tort . . ., there would still remain a number of extremely complicated and unprecedented questions, such as the applicable statute of limitations, the allegations sufficient to state a 'cause of action', and the damage components" (180a-181a). The district court further found that the issues of state law predominate over any issues of federal law, "particularly in light of their novelty and complexity, even though one of the issues at trial is likely to be

whether the Empire and Sitomer defendants violated the federal securities laws" (181a). The district court then denied the motions to dismiss without prejudice and retained jurisdiction over the case, suspending all further proceedings in the federal court pending the commencement and final determination of an action or actions in the state court encompassing all the state claims, cross-claims and counterclaims of the parties alleged in this action (182a-183a).

## ARGUMENT

### POINT I

### THERE IS NO INDEPENDENT FEDERAL QUESTION JURISDICTION UNDER 28 U.S.C. §1331 SINCE THE CLAIMS ASSERTED BY GOLDBERG AGAINST EMPIRE ARE ALL STATE CLAIMS

(1)

The United States Supreme Court has repeatedly held that, in order for a claim to arise under the Constitution, laws, or treaties of the United States, "a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125, 127 (1974), citing Gully v. First National Bank, 299 U.S. 109, 112 (1936)*. The federal questions "must be disclosed upon the face of the complaint ..." Phillips Petroleum Co. v. Texaco, Inc., supra at 128. See also Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950); Taylor v. Anderson, 234 U.S. 74 (1914); Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149 (1908); Tennessee v. Union & Planters' Bank, 152 U.S. 454

* The appealability of the orders in question is discussed in the Appellee Aschkenasy's Brief.

(1894); Metcalf v. Watertown, 128 U.S. 586 (1888).

Upon this appeal Goldberg alleges for the first time that independent federal question jurisdiction pursuant to 28 U.S.C. § 1331 exists because Goldberg's claims in this litigation are "all premised upon the federal securities laws violations which were asserted originally by the plaintiff in this action" (Appellant's Brief p. 15). However, Goldberg concedes that his claims are set forth in terms of common law tort theory, and that these claims are by nature state claims (Appellant's Brief p. 16). As Goldberg has described his claim against Empire in his Brief (p.48-51) for "injurious involvement "this is a non-conventional tort which he claims "is by no means a case of first impression under New York law" (emphasis added). With the exception of one English case, all of the cases cited by Goldberg to describe this claim are New York cases. Similarly, in support of his cause of action for "fraud" Goldberg cites with the exception of one case from this court, only New York cases (Appellant's Brief p. 46-48). In fact, Goldberg in substance concedes that this is a New York cause of action, stating on page 46 of his Brief that "very little, if anything novel or unique under New York State law is involved in this cause of action".

In Goldberg's briefs in opposition to Empire's two previous motions to dismiss Goldberg's counterclaims Goldberg also admitted that he was postulating state causes of action and cited mainly New York cases. For example, in Goldberg's Memorandum of Law in Opposition to Motion to Dismiss (first motion) page 7, Goldberg stated that the principle of non-conventional and nameless torts "has been adopted by the New York Courts" and on page 16 of that Memorandum Goldberg stated "... New York law, which is the substantive law applicable to this lawsuit... "; in Goldberg's Memorandum of Law in Opposition to Defendants' Motions to Dismiss (second motion) on page 7, Goldberg described the elements of his fraud claim under "New York" law. See also Goldberg's Memorandum of Law in Opposition to Motion to Dismiss (first motion) pages 6-37 and Goldberg's Memorandum of Law in Opposition to Defendants' Motion to Dismiss (second motion) pages 2-8, 10-12, 17-19.

(2)

Goldberg's assertion that independent federal question jurisdiction exists is incorrect. Goldberg admits on page 16 of his Brief that he has not asserted a claim for a remedy "expressly granted" or "otherwise inferred" from the federal securities laws as is required by the cases cited

on pages 13-15 of Goldberg's Brief. Goldberg's claims further do not disclose a "need for interpretation "of the securities laws or other federal laws as required pursuant to Ivy Broadcasting Co. v. American Telephone & Telegraph Co., 391 F. 2d 486 (2d Cir. 1968).

Goldberg further admits on page 16 of his Brief that he lacks standing to recover damages under any "implied" right of action pursuant to Section 10(b) and Rule 10 b-5 thereunder of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b) and 17 C.F.R. §240.10b-5 (1977).

The Supreme Court held in dismissing the complaint in Blue Chips Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) that a person who is neither a purchaser nor a seller of securities may not bring an action under Section 10(b) of the Securities Exchange Act of 1934 or the SEC's Rule 10b-5. If the plaintiff in Blue Chips Stamps, supra, whose claim involved a direct violation of the Securities Exchange Act of 1934 could not bring an action in federal court, certainly Goldberg cannot sustain federal question jurisdiction in this case since he cannot even allege a violation of the securities laws.

Goldberg's assertion that federal question jurisdiction may be "implied" in the present case because the resolution of Goldberg's claims allegedly involves significant questions of federal securities policy (Appellant's Brief pp. 17-20) is not in accord with recent decisions of the United States Supreme Court. As the Supreme Court found in Santa Fe Industries, Inc. v. Green, ___ U.S.___, 45 U.S.L.W. 4317 (1977), in the absence of a clear indication of congressional intent, the Courts should be reluctant to federalize state law simply because it deals with transactions in securities.

The Supreme Court in Cort v. Ash, 422 U.S. 66 (1975) set forth four criteria to be employed in deciding whether there is a federal cause of action:

(1) "[i]s the plaintiff one of the class for whose especial (emphasis by the Court) benefit the statute was enacted -- that is, does the statute create a federal right in favor of the plaintiff?"

(2) "[i]s there any indication of legislative intent explicit or implicit, either to create such a remedy or deny one?"

(3) "[i]s it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?"

(4) "[i]s the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law?" Id. at 78, as cited in 1 Moore's, Federal Practice ¶0.62 [2.-2].

In the present case, Goldberg's claims if they exist at all are traditional state causes of action for conventional and non-conventional tort. Although, Goldberg claims (Appellant's Brief p. 19) that congressional interest will be served if federal question jurisdiction is accepted, he does not cite any legal authority in support of this contention. Since Goldberg's claims do not meet any of the criteria of Cort v. Ash, supra, it cannot be established that there is independent federal question jurisdiction in the present case.

The cases cited by Goldberg on page 20 of his Brief do not establish federal question jurisdiction in the present case. In those cases, the issue of jurisdiction is not even discussed since the cases were clearly brought because of claims asserted under the securities laws. Goldberg, who is not asserting claims under the 1933 or 1934 securities laws, who clearly does not have standing to sue under the securities laws and who has repeatedly conceded that he is asserting state law claims is certainly not in a similar position to the plaintiffs in those cases.

## POINT II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY RETAINING JURISDICTION OVER THE CASE WHILE SUSPENDING ALL FURTHER PROCEEDINGS IN THE FEDERAL COURT PENDING THE COMMENCEMENT AND FINAL DETERMINATION OF AN ACTION OR ACTIONS IN STATE COURT ENCOMPASSING ALL OF THE STATE CLAIMS, CROSS-CLAIMS AND COUNTERCLAIMS OF THE PARTIES ALLEGED IN THIS ACTION.

(1)

Goldberg's contention that the district court had mandatory ancillary jurisdiction over his counterclaims is based solely on his assertion that these counterclaims were "compulsory counterclaims" pursuant to Rule 13(a) of the Federal Rules of Civil Procedure.

Rule 13(a) provides that a counterclaim is compulsory "if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim". In the present case, the damages Goldberg allegedly suffered relate to publicity surrounding the suit and extra-judicial publication of judicial opinions allegedly occurring subsequent to the commencement of the action. These claims clearly do not arise "out of the transaction or occurrence" that is the subject matter of Empire's cross-claims against Goldberg and are not compulsory counterclaims under Rule 13(a).

In O'Connell v. Erie Lackawanna R.R. Co., 391 F.2d 156 (2d Cir. 1968), vacated as moot, 395 U.S. 210 (1969), this Court held that a counterclaim for libel did "not arise out of the same transaction or occurrence" as the plaintiffs' claim that

strict union shop clauses in a railroad collective bargaining agreement violated the Railroad Labor Act, and affirmed dismissal of the counterclaim "for lack of jurisdiction over the subject matter". Id. at 163. See also Fidelity & Casualty Co. of New York v. Coffelt, 11 F.R.D. 443, 444 (S.D. Iowa 1951) in which a counterclaim sounding in malicious prosecution and libel and based on the commencement of the main action and allegations contained in the complaint was held not to constitute a compulsory counterclaim.

(2)

Even if Goldberg's counterclaims were assumed to be compulsory counterclaims to Empire's cross-claims, the counterclaims would stand on no better jurisdictional footing than Empire's cross-claims, since the counterclaims are state law claims in response to Empire's state law claims and not to the federal claims of the plaintiff. The Empire cross-claims against the other defendants and Goldberg as an additional defendant on Empire's cross-claims pursuant to Rule 13(h) of the Federal Rules of Civil Procedure (24a-28a)* are state law claims for negligence and malpractice in the preparation of the registration statement which was the subject of plaintiffs' action (24a-28a). Once the plaintiffs' action was settled, the district court had discretionary pendent jurisdiction over these cross-claims. See 3 Moore's Federal

* Contrary to Goldberg's assertion on page 39 of his Brief, Empire's claims against Goldberg are not third-party claims pursuant to Rule 14 of the Federal Rules of Civil Procedure but instead are cross-claims brought against an additional defendant under Rule 13(h) of the Federal Rules of Civil Procedure.

Practice ¶13.36 p. 13-929. See also Ramey v. Cincinnati Enquirer, Inc., 508 F.2d 1188, 1200 (6th Cir. 1974), cert. denied, 422 U.S. 1048 (1975); Bache & Co., Inc. v. Roland, 375 F. Supp. 989 (S.D.N.Y. 1974); cf. Mayer v. Chase National Bank, 165 F. Supp. 287, 292 (S.D.N.Y. 1958).

The cases cited on pages 30-34 of Goldberg's Brief are not relevant to the present case since those cases concern either third-party claims within the meaning of Rule 14 of the Federal Rules of Civil Procedure (Schwab v. Erie Lackawanna R.R. Co., 438 F.2d 62 (3d Cir. 1971); Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959)) or compulsory counterclaims pursuant to Rule 13(a) of the Federal Rules of Civil Procedure asserted against main claims based upon independent federal question jurisdiction (Koufakis v. Carvel, 425 F.2d 892 (2d Cir. 1970); Pipeliners Local Union No. 798 v. Ellerd, 503 F.2d 1193 (10th Cir. 1974)). That clearly is not the case here.

(3)

The district court did not abuse its discretion in determining that it should not exercise jurisdiction. As stated in United Mine Workers v. Gibbs, 383 U.S. 715 (1966):

> "It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims even though bound to apply state law to them, Erie R. Co. v. Tompkins, 304 U.S. 64." Id. at 726.

Since the only remaining issues in the case are state law claims, there is no reasonable basis for retention of federal

jurisdiction. In Gibbs the Supreme Court said that:

> "Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. Similarly, if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to the state tribunals." Id. at 726.

The Supreme Court further stated that:

> " . . . recognition of a federal court's wide latitude to decide ancillary questions of state law does not imply that it must tolerate a litigant's effort to impose upon it what is in effect only a state law case. Once it appears that a state claim constitutes the real body of a case, to which the federal claim is only an appendage, the state claim may fairly be dismissed." Id. at 727.

In Kavit v. A.L. Stamm & Co., 491 F.2d 1176 (2d Cir. 1974) Judge Friendly stated that while the determination whether or not to invoke pendent jurisdiction should generally rest in the sound discretion of the district court, citing United Mine Workers v. Gibbs, supra, the Supreme Court "used mandatory language in directing that when the federal claims are dismissed before trial 'even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.' 383 U.S. at 726, 86 S.Ct. at 1139 (emphasis added)." Id. at 1179. This Court has

consistently followed this policy. See e.g., Calderone Enterprises Corp. v. United Artists Theatre Circuit, 454 F.2d 1292, 1297 (2d Cir. 1971), cert. denied, 406 U.S. 930 (1972); Abrams v. Carrier Corp. 434 F.2d 1234, 1254 (2d Cir. 1970), cert. denied sub nom. United Steel Workers v. Abrams, 401 U.S. 1009 (1971); Yanity v. Benware, 376 F.2d 197, 200 (2d Cir.), cert. denied, 389 U.S. 874 (1967).

In the present case since the federal claims were settled before trial, the Court properly directed the parties to state court for resolution of the remaining state claims in accordance with the mandatory language in Gibbs. Furthermore, since the issues raised by Goldberg are without precedent in New York, it might have been an abuse of the judge's discretion to insist on determining these issues in federal court where the court had only discretionary pendent jurisdiction. See Nolan v. Meyer, 520 F.2d 1276, 1280 (2d Cir.), cert. denied, 423 U.S. 1034 (1975).

It should be noted that even in cases in which the district courts have had diversity jurisdiction some courts have stayed these actions pending resolution of difficult state law problems by the state courts where the issues were of concern mainly to the parties and not of paramount importance to the state itself. See e.g. Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509 (2d Cir. 1973); Reichman v. Pittsburgh Nat'l Bank, 465 F.2d 16, 18 (3d Cir. 1972), United Services Life

Ins. Co. v. Delaney, 328 F.2d 483 (5th Cir.) cert. denied, 377 U.S. 935 (1964).

In addition, contrary to Goldberg's assertion on page 43 of his Brief, there will be no judicial diseconomy in proceeding in state court. All of the discovery taken in this case can be utilized in a state action. Since the only witnesses at the deposition were parties to the action, i.e. Yale Kaplan, Gary O. Gross, Goldberg, Aschkenasy, Alvin Sitomer and Stephen Sitomer, the deposition testimony may be admissible into evidence as admissions, or used to impeach these witnesses pursuant to New York CPLR 4514. Furthermore, Goldberg's assertion, on page 42 of his Brief, that he was prepared to go to trial on ten days notice in April 1976 is inaccurate. In his amendment to his amended answer of January 1977 drafted after Goldberg changed attorneys for the fourth time and after Goldberg's depositions were completed, Goldberg added new claims against Empire, e.g. claims for alleged psychiatric damage, which will require further discovery if it is determined that Goldberg's counterclaims state causes of action.

Under the circumstances of this case, the district court properly refrained from exercising pendent jurisdiction in order to avoid a result where "the dog would be wagged by his tail." Kavit v. A.L. Stamm & Co., supra at 1180, citing Hart & Wechsler, The Federal Courts and the Federal System 925 (2d ed. 1973). See also McFaddin Express, Inc. v. Adley Corp., 346 F.2d 424, 427 (2d Cir. 1965), cert. denied, 382 U.S. 1026 (1966).

(4)

A most compelling reason supporting the district court's determination is the questionable sufficiency of Goldberg's claims under New York law. On January 14, 1977, Empire moved to dismiss the first and second counterclaims asserted against them in the "Amendment to Amended Answer of Additional Defendant Stuart Charles Goldberg" on the ground that each of those counterclaims fails to state a claim upon which relief can be granted.

The essence of Goldberg's first counterclaim of "injurious involvement", stripped of irrelevant evidentiary detail, is identical to the pleading initially found to have been insufficient by the district court in its decision of December 3, 1976 (421a) and is substantially similar, if not identical, to the claim dismissed by the New York Court of Appeals in Morrison v. National Broadcasting Co., 19 N.Y. 2d 453 (1967). The Morrison case and related authorities mandate dismissal of Goldberg's first counterclaim on its merits.

Just as in the Morrison case, the district court is not required to reach the question of whether the novel tort of "injurious involvement" is theoretically actionable under New York law. Even if it is actionable in theory, it would only support a claim for special damages, which cannot be based on speculation, and would in no event support a claim for general damages. See also Rager v. McCloskey, 305 N.Y. 75, 80-81 (1953); Nichols v. Item Publishers, 309 N.Y. 596, 602 (1956); O'Connell v. Press Publishing Co., 214 N.Y. 352, 358 (1915); El Meson Espanol v. NYM Corp., 521

F.2d 737, 740 (2d Cir. 1975); McBride v. Crowell - Collier Pub. Co., 196 F.2d 187, 188-89 (5th Cir. 1952); Zausner v. Fotochrome, 18 App. Div. 2d 649 (1st Dep't 1962); Davidson v. National Broadcasting Co., Inc., 26 Misc. 2d 936, 938-39 (Sup. N.Y. 1960).

All of the items of general and speculative damages claimed by Goldberg are simply not recoverable under applicable New York law. The $850,000 item claimed by Goldberg (¶ 60a(i)) (alleged injury to his reputation giving rise to purported inability to gain employment with a private law firm) has repeatedly been conceded by Goldberg's counsel to be an item of general damages. See statements of Goldberg's attorney, Mr. Bergadano, 199a and 197a; statements of Goldberg admitting that his estimate of damages is only speculation, 203a-206a.*

Goldberg's claim of $16,187 (¶60a(i)) based on his alleged inability to obtain employment from January 21 to September 1, 1973 has been conceded by Goldberg, under oath, to be based on inference unsupported by any facts whatsoever (342a-344a, 208a, 303a-305a, 315a-318a, 239a-259a) and, as such, is insufficient as a matter of law under the holding of the Morrison case.

The matters referred to in subparagraphs 60a(i) through (ix) of Goldberg's current pleading are alleged to have resulted in the injuries set forth in subparagraph 60a(x). The latter subparagraph refers, among other things, to "injury to his professional and personal reputation . . . in the amount of $150,000"; "[s]evere mental and emotional pain and suffering in the amount of $1,000,000"; and "[p]hysical pain and suffering from an asthmatic condition

* Goldberg's allegation of "severe emotional and mental pain and suffering in being rejected for employment" (¶60a(i)) is likewise an allegation of general damages and, as such, is legally insufficient.

triggered by his emotional reaction to the events complained of herein in the amount of $10,000". These are all allegations of general damages and, as such, legally insufficient.

Subparagraph 60a(x)(4) also refers to "medical expenses" in the amount of $610. These fees cover psychiatric visits allegedly occurring since Goldberg's disclosures to the S.E.C. One of these psychiatric consultations was claimed by Goldberg at his deposition to have been occasioned by statements claimed to have been made by Aschkenasy's counsel at the conclusion of one session of the deposition. Goldberg's deposition established, without dispute, that he had approximately 100 psychiatric consultations prior to his resigning from the Sitomer firm and going to the S.E.C. and dating back as far as 1970, substantially before he became a limited partner of the Sitomer firm (Goldberg Depo. pp. 1208-1211). To attribute these psychiatric fees to the Empire defendants does not even rise to the level of the "speculation" which was held insufficient in Morrison, supra at 458.

Subparagraphs 60a(v), (vii) and (viii) refer to legal fees and disbursements claimed by Goldberg, most of which are for his representation in the present litigation. These are not proper items of damage for which Goldberg can sue. City of Buffalo v. J.W. Clement Co., 28 N.Y. 2d 241, 262-63, rearg. denied, 29 N.Y. 2d 640 (1971); see also 8 Weinstein-Korn-Miller, New York Civil Practice ¶8301.04, p. 83-8; 13 N.Y. Jur. Damages §§ 143, 145.

In addition Goldberg's first counterclaim is based almost entirely on matters which are privileged under state and constitutional law. Subparagraphs 60a(vii) and (viii) of Goldberg's

pleading refer to certain prior proceedings taken in this litigation which involved Goldberg. These proceedings are legally privileged and not actionable. See Seltzer v. Fields, 20 App. Div. 2d 60, 62 (1st Dep't 1963), aff'd, 14 N.Y. 2d 624 (1964); see also Spieler v. Gottesman, 12 App. Div. 2d 894 (1st Dep't 1961); Selas Corp. of America v. Wilshire Oil Co. of Texas, 344 F. Supp. 357 (E.D. Pa. 1972).

Nor may Goldberg predicate a claim on administrative or quasi-judicial proceedings before the S.E.C. (initiated by him) or the grievance committee (allegedly commenced by the Sitomer firm and, in any event, certainly not chargeable to the Empire defendants). Studley Inc. v. Lefrak, 50 App. Div. 2d 162 (2d Dep't 1975) (agency proceedings accorded a similar privilege to court proceedings).

Nor may Goldberg sue for purported injury resulting from published commentaries relating to the proceedings in which he has been involved (¶¶60a(iv), (v), (vi) and (ix)). Garfield v. Palmieri, 193 F. Supp. 137 (S.D.N.Y. 1961), aff'd, 297 F.2d 526 (2d Cir. 1962). See also Chapadeau v. Utica Observer Dispatch, Inc., 38 N.Y. 2d 196 (1975) and Bloom v. Seltzer, N.Y.L.J. 1/23/76, p. 11, col. 3 (Sup. Suffolk)(Scileppi, J.)(n.o.r.), construing First Amendment rights and cases under Section 74 of the New York Civil Rights Law, e.g. Shiles v. News Syndicate Co., Inc. 27 N.Y. 2d 9 (1970); Hanft v. Heller, 64 Misc. 2d 947 (Sup. N.Y. 1970); Phillips v. Murchinson, 252 F. Supp. 513 (S.D.N.Y. 1966); Wojcinski v. Foley, 226 F. Supp. 157, 160 (N.D.N.Y. 1963); Studley, Inc. v. Lefrak, supra.

As to commentary in legal publications and notoriety in the public media (¶60a(ix)), Goldberg cannot predicate a claim on publications which are not, under any reasonable interpretation, defamatory in content. See El Meson Espanol v. NYM Corp., supra, Rogow, Inc. v. Ally, Inc., 29 App. Div. 2d 423 (1st Dep't 1968); aff'd, 25 N.Y. 2d 943 (1969); Tracy v. Newsday, Inc., 5 N.Y. 2d 134 (1959); Hays v. American Defense Society, 252 N.Y. 266 (1929); O'Connell v. Press Publishing Co., 214 N.Y. 352 (1915). The various published commentaries and reports on which Goldberg relies, when fairly read, are not defamatory and even if they were, cannot rationally be alleged to have been defamatory publications made by the Empire defendants. See Goldberg deposition testimony, 316a-318a quoted, infra at p. 34. Goldberg has totally failed to show any publication by the Empire defendants which, either on its face or by "innuendo", could fairly be deemed defamatory of Goldberg. In the absence of such a showing, Goldberg's subjective surmises and speculations cannot be a proper basis for a claim for injury to his reputation.

Furthermore, even under Goldberg's version of the facts, Goldberg has failed to establish that the alleged damage to his reputation was the direct and proximate consequence of Empire's acts. See Rager v. McClosky, supra at 81; Reporters Association v. Sun Printing & Pub. Association 186 N.Y. 437, 443 (1906); Deyo v. Hudson, 225 N.Y. 602, 617-18 (1919); Jex v. Straus, 122 N.Y.

293, 301-02 (1890).

Goldberg's second counterclaim, which seeks to plead a traditional fraud claim, is also insufficient as a matter of law. Even if a fraud cause of action were theoretically applicable, Goldberg's claim would fail because he has failed to plead damages of a kind which would be legally recoverable i.e., pecuniary or out-of-pocket loss proximately caused by the alleged fraud. See e.g. Reno v. Bull, 226 N.Y. 546, rearg. denied 227 N.Y. 591 (1919); Ochs v. Woods, 221 N.Y. 335 (1917). See also Sager v. Friedman, 270 N.Y. 472 (1936); Hanlon v. MacFadden Publications, Inc., 302 N.Y. 502 (1951); Flamm v. Noble, 296 N.Y. 262, 268 (1947); Corcoran v. O'Brien, 21 App. Div. 2d 838 (3d Dep't 1964); Majestic Export Co., Inc. v. Katz & Greenfield, Inc., 248 App. Div. 205 (1st Dep't 1936).

The district court found that Goldberg's claims stated in his amended answer did not sufficiently state causes of action. The district court never reached the sufficiency of Goldberg's claims in the amendment to the amended pleading. However, as shown above, it is very possible that if this case is remanded or if this case is brought in state court the trial court will find that Goldberg still has failed to state a claim under New York law against Empire. Under these circumstances the trial judge's determination should be deemed a proper exercise of its judicial discretion.

## POINT III

GOLDBERG'S MOTION FOR RECUSAL AND TRANSFER TO ANOTHER JUDGE OF THE SOUTHERN DISTRICT OF NEW YORK WAS PROPERLY DENIED SINCE IT WAS NOT TIMELY AND SINCE IT IS WITHOUT BASIS IN LAW OR FACT

(1)

On August 23, 1973, Judge MacMahon found that plaintiffs' attorneys had violated Canons 4 and 9 of the Code of Professional Responsibility (67a-80a). This decision was reversed by this Court on June 10, 1974 (81a-87a). Six days later, on June 16, 1974, Goldberg filed an amended answer in the Federman action which included a counterclaim against the Empire defendants for damage to Goldberg's reputation (30a-42a). This counterclaim was signed by Goldberg's attorneys Hart and Hume and Wormser, Kiely Alessandroni,Mahoney & McCann (42a). In addition, the firm of Julien & Schlessinger also represented Goldberg with respect to his counterclaims when he was deposed (196a-364a). Apparently, none of these law firms considered it appropriate or necessary to make a motion for recusal.

Settlement of claims by the plaintiffs against all defendants was approved by Judge MacMahon in a memorandum filed on January 19, 1976 (88a-108a). All parties realized that the settlement had an effect on Goldberg's claims. In fact, Judge MacMahon specifically raised the question of Goldberg's claims and noted the continuance of these claims

in his memorandum opinion (106a).

Two years after the decision which allegedly damaged Goldberg's reputation and upon the retention of a fourth firm of attorneys, Goldberg belatedly moved for recusal of Judge MacMahon. Even if the allegations of Goldberg had some validity, the opinion of Judge MacMahon upon which Goldberg's recusal motion is based, was rendered approximately four years ago. In addition, it should be noted that Goldberg did not move until after discovery had been concluded and the case was, according to Goldberg's counsel, on the eve of trial.

Goldberg's motion after settlement of the main part of the claim was not timely. See United States v. Newman, 481 F. 2d 222,223 (2d Cir.), cert. denied, 414 U.S. 1007 (1973), in which this Court stated that the delay until the eve of trial alone justified denial. cf. cases in which the recusal motions pursuant to 28 U.S.C. §144 were found to be untimely, Duplan Corporation v. Deering Milliken, Inc. 400 F. Supp. 497 (D.S.C. 1975); Cranston v. Freeman, 290 F. Supp. 785, 816 (N.D.N.Y. 1968); rev'd on other grounds, 428 F. 2d 822 (2d Cir. 1970), cert. denied, Duncan v. Cranston, 401 U.S. 949 (1971).

Some courts have also held that if a motion for recusal under 28 U.S.C. §455 is not timely made, the party waives the right to question the qualification of the judge. See e.g. Adams v. United States, 302 F. 2d 307 (5th Cir. 1962) ("substantial interest"); Ramirez v. United States, 294 F. 2d 277 (9th Cir. 1961).

(2)

Goldberg specifically concedes that he is not suggesting or intimating that Judge MacMahon was consciously biased or prejudiced against him (Appellant's Brief p. 54). In fact, no showing of bias or prejudice can be made. The district court never acted harshly with respect to Goldberg's counterclaims and cross-claims or dismissed these claims. When the Judge dismissed Goldberg's amended complaint in 1976, he gave him leave to replead (421a). When the district court stayed the action on this case pending the commencement of a state court action by Goldberg, it specifically retained jurisdiction over the case (182a).

Goldberg's allegations that Judge MacMahon, in violation of 28 U.S.C. §455, would have a "substantial interest" in the litigation, and would be a "material witness" in this case and that it would be "improper, unfair and injurious to the appearance of justice for Judge MacMahon to preside at a trial of this action" (Appellant's Brief p. 54), have no basis in fact or law.

It should be noted that the August 23, 1973 opinion of Judge MacMahon is privileged since it was part of a judicial proceeding and may not be the basis of a lawsuit for alleged damage to reputation.

Seltzer v. Fields, supra. See also Spieler v. Gottesman, supra; Selas Corp. of America v. Wilshire Oil Co. of Texas, supra. In addition, the opinion in question never labelled Goldberg as unethical, stating instead that Goldberg and plaintiff's counsel had acted in good faith and that the judge's determination was based on avoiding the appearance of impropriety (77a). Judge MacMahon never critized Goldberg's contacts with the SEC. The judge specifically said that "[w]e do not consider the propriety of Goldberg's disclosures to the SEC" (80a). His decision was solely based on the contacts between Goldberg and plaintiff's attorneys in this case. Furthermore, as Goldberg states in his Brief (p. 52) and stated during his deposition testimony (316a-318a) it was not the judge's opinion but rather allegedly inaccurate newspaper reporting of this opinion which resulted in Goldberg's alleged damage to reputation.

This particular point is forcefully illustrated by a portion of Goldberg's testimony relating to the district court's decision of August 23, 1973:

> "Q Mr. Goldberg, did you feel and do you feel that Judge MacMahon's decision branded you?
>
> "A Yes.
>
> "Q My question is, why did you construe the decision on that way in view of the Judge's statement and his opinion that he was not challenging the good faith of the attorneys involved?
>
> "A Because it is the way the public interpreted the opinion. The headline the next few days is 'Ethics Violation Found.' I was the ethics violator in the article.

"Q In the article?

"A Yes, this is the way the press interpreted Judge MacMahon's opinion.

"Q Do you claim my clients are responsible for the way the press interpreted Judge MacMahon's decision?

"A Absolutely.

"Q Is that your claim in this case?

* * *

"A Yes, sir, part of the claim" (316a-318a).

There is no applicable ground under 28 U.S.C. §455 for recusal of the district court judge in this case.

Goldberg alleges[3] that the district court judge should have disqualified himself because "Judge MacMahon, by reason of the role which his erroneous ethics decision has played in increasing Goldberg's foreseeable damages, has a 'substantial interest' in the litigation" (Appellant's Brief p. 55). Contrary to Goldberg's assertion, without citation on page 55 of his brief, "substantial interest" within the meaning of 28 U.S.C. §455 has usually been interpreted to mean a pecuniary or beneficial interest in the outcome of the litigation. See In Re Grand Jury Investigation, 486 F.2d 1013, 1016 (3d Cir. 1973), cert. denied, sub nom. Testa v. United States, 417 U.S. 919 (1974); United States v. Hoffa, 382 F.2d 856, 861 (6th Cir. 1967), cert. denied, 390 U.S. 924 (1968); United States v. Bell, 351 F.2d 868, 878 (6th Cir. 1965), cert. denied, 383 U.S. 947 (1966);

Kinnear-Weed Corp. v. Humble Oil & Refining Co., 324 F. Supp. 1371, 1385 (S.D. Texas, 1969), aff'd, 441 F.2d 631 (5th Cir.), cert. denied, 404 U.S. 941, reh. denied, 404 U.S. 996 (1971); Lampert v. Hollios Music Inc., 105 F. Supp. 3 (E.D.N.Y. 1952).

Only rarely has a nonfinancial interest been recognized under the statute. The following "alleged interests" have not been found to be substantial interests within the meaning of Section 455: cases in which the judge has been a United States attorney during earlier prosecutions of witnesses at a grand jury or defendants in criminal actions, see e.g. In Re Grand Jury Investigations, supra and Gravenmier v. United States, 469 F.2d 66 (9th Cir. 1972); cases in which the judge had ruled adversely to a party on a motion to disqualify for bias and prejudice under 28 U.S. §144., see e.g. United States v. Hoffa, supra; trial judge's business dealings with defendant in patent law suit in which the judge gained no pecuniary advantage whether the plaintiff won or lost, Kinnear-Weed Corp. v. Humble Oil & Refining Co., supra; and an interest represented by 20 shares of common stock of a corporation which had issued 13,881,016 shares of no par common stock, Lampert v. Hollios Music Inc., supra.

The cases cited by Goldberg in support of his contention that the district judge has a "substantial interest" in the outcome of this litigation are distinguishable on their facts. In In Re Murchison, 349 U.S. 133 (1955), the trial judge had himself

operated as a "one-man grand jury" under Michigan law in investigating a crime. There is no similar combination of prosecutorial and judicial roles in the present case. Cf. United States ex rel Monty v. McQuillan, 385 F. Supp. 1308, 1311 (E.D.N.Y. 1974), aff'd, 516 F.2d 897 (2d Cir. 1975).

In United States v. Bryan, 393 F.2d 90, 91 (2d Cir. 1968), this Court stated that a criminal case should ordinarily be retried before a different trial judge. However this court in Bryan was specifically interpreting U.S. Dist. Ct. Rules S. & E. N.Y.2 and was speaking of reassignment as the "wiser practice" in retrials of "lengthy criminal cases", 393 F.2d at 91. It was not setting down a requirement in every case. See United States v. Newman, supra at p. 223. This situation is not at all analogous to the present case. See also Wolfson v. Palmieri, 396 F.2d 121, 126 (2d Cir. 1968) in which Bryan was limited to the "particular facts" there presented.

Goldberg's argument that the district court judge should have disqualified himself for interest, based on the "subconscious influence" that his previous decision will have on the conduct of this trial is totally untenable. In Public Utilities Comm. v. Pollak, 343 U.S. 451 (1952), cited by Goldberg on this point at pages 59-60 of his Brief concerning the amplification of radio programs in streetcars and buses, Justice Frankfuter recused himself, because he had been subjected to

the practice in controversy and felt that he could not be unbiased. However, the situation in that case is not similar to the instant case. It should also be noted that Justice Frankfuter's determination was not based on 28 U.S.C. §455 and therefore was not interpreting the words "substantial interest" within the meaning of that statute.

(4)

Goldberg's argument that the district court should be recused because the judge may be a material witness in the trial of this action in violation of 28 U.S.C. §455 is completely baseless. The mandate of 28 U.S.C. §455 only applies if the trial judge is in fact called as a witness. See United States v. Hughes, 325 F.2d 789, 792-93 (2d Cir.), cert. denied 377 U.S. 907 (1964); United States v. Re, 372 F.2d 641 (2d Cir.), cert. denied, 388 U.S. 912 (1967). Where no evidentiary hearing is required at which a judge who might be a "material witness" would testify the refusal of the lower court to disqualify itself is not an abuse of discretion.

The cases concerning review of guilty pleas cited by Goldberg, are not relevant to the present case. Halliday v. United States, 380 F.2d 270 (1st Cir. 1967), reh. denied, 395 U.S. 971 (1969) was specifically limited to the issue of whether under 28 U.S.C. §2255 the original sentencing judge was disqualified from conducting an evidentiary hearing on a petition for vacation of a sentence which challenged the validity of a prior determination that the guilty plea had been made voluntarily and with an understanding of the nature of the charge. For this reason United States v. Halley, 240 F.2d 418 (2d Cir. 1957) and United States v. Valentino, 283 F.2d 634 (2d Cir. 1960) are not relevant to the present case. In addition, as stated in United States v. Hughes, supra at 792-93, Halley and Valentino, merely state a rule of good practice, which rule is not applicable here and the violation of which, in any event, does not require the finding of an abuse of discretion when in fact the judge does not participate as a material witness.

Similarly, United States v. Columbia Broadcasting System, 497 F.2d 107, 109 (5th Cir. 1974) is distinguishable since the Fifth Circuit specifically stated that its decision was tailored to a judicially unique situation of a criminal contempt

action for violation of a court order.

(5)

Goldberg's statements that if the district court judge is not recused it would be unfair to the "appearance of justice" or render the proceedings unfair as a matter of constitutional due process are unfounded. Under Goldberg's reasoning, any time an appellate court reverses a ruling of a district judge (even a trial determination) and remands the case for further proceedings the district court judge would be obliged to recuse himself.

It is well established that adverse rulings, standing alone, do not establish judicial bias or prejudice. Berger v. United States, 255 U.S. 22, 31 (1921); United States v. Schwartz, 535 F.2d 160, 165 (2d Cir. 1976), cert. denied, ___U.S.___ (1977); United States v. Hoffa, supra; Duplan Corp. v. Deering Milliken, Inc., supra; Cranston v. Freeman, 290 F. Supp. 785, 816 (N.D.N.Y. 1968), rev'd on other grounds, 428 F.2d 822 (2d Cir. 1970), cert. denied, sub nom, Duncan v. Cranston, 401 U.S. 949 (1971); Stambler v. Dillon, 302 F. Supp. 1250, 1253 (S.D.N.Y. 1969), where the court stated "a charge that a judge who rules against a litigant is thereby prejudiced him is frivolous and harassing".

Similarly, such adverse rulings do not create a reasonable question of judicial impartiality. See United States v. Schwartz, supra; Lazofsky v. Somerset Bus Co., 389 F. Supp.

1041, 1044 (E.D.N.Y. 1975). In Lazofsky v. Somerset Bus Co., supra, Judge Platt applied the tests of 28 U.S.C. §455 in denying a motion for recusal based on a prior adverse determination of the judge, in that case a declaration of mistrial. Judge Platt stated:

> "If the words 'impartiality might reasonably be questioned' and 'avoid impropriety and the appearance of impropriety' were to be interpreted to encompass judicial rulings in the course of a trial or other proceedings, as plaintiff's counsel seemingly suggests herein, then there would be almost no limit to disqualification motions and the way would be opened to a return to 'judge shopping' a practice which has been for the most part universally condemned. Certainly every ruling on an arguable point during a proceeding may give 'the appearance of' partiality, in the broadest sense of those terms, to one party or the other. Neither the ABA or Congress has, as yet, indicated that the law should be so construed nor have they yet prescribed that parties should be given one or more peremptory charges with respect to judges." Id. at 1044.

These principles are applicable also to cases based on remarks made upon sentencing by the trial court of a co-defendant in an earlier proceeding, United States v. Scalafani, 487 F.2d 245, 255 (2d Cir.), cert. denied, sub nom. Ross v. U.S., 414 U.S. 1023 (1973), as well as cases in which the trial judge set aside the verdicts in the first trial as against the weight of evidence, see Chiarello v. Domenico Bus Service, Inc., 542 F.2d 883, 885 (2d Cir. 1976); cf. Wolfson v. Palmieri, 396 F2d 121, 124-25 (2d Cir. 1968); Hanger v. United States, 398 F.2d 91, 101 (8th Cir. 1968), cert. denied, 383 U.S. 1119, reh. denied, 395 U.S. 971 (1969).

Even in Winters v. Travia, 495 F.2d 839 (2d Cir. 1974) cited by Appellant (p. 57) this Court interpreting U.S. District Ct. Rules S. & E.D.N.Y. , General Rule 34 did not disqualify the trial judge because the judge had earlier dismissed the plaintiff's suit on the basis that the complaint failed to state a claim upon which relief could be granted. Although this Court recommended that the trial judge consider recusing himself to preserve the "appearance of justice", this recommendation was based on what this Court considered to be the unusual facts of that case.

United States v. Quattrone, 149 F. Supp. 240, (D.D.C. 1957) is also not relevant to the present case. In that case the judge disqualified himself because he was concerned that it might appear that he was influenced by a particular incident. However, the judge specifically stated that the court was not required to disqualify itself in that case. Similarly, United States v. Zarowitz, 326 F. Supp. 90 (C.D. Calif. 1971) is not applicable to the instant case. In that case the judge disqualified himself sua sponte because of charges made by a party of the judge's alleged personal bias and prejudice. Such allegations have been specifically disavowed by Goldberg.

(6)

Goldberg's argument that the presence of the trial judge would have a chilling effect on the witnesses, made without citation of a single case, is completely baseless. Similarly Goldberg's argument that the jury will be influenced by the trial judge, also made without citation of authority is completely specious.

In addition Goldberg's assertion on page 61 of his Brief that the court below abused its discretion because it denied his recusal motion without oral argument of the motion or submission of briefs in opposition to the motion is incorrect and is made again without citation of authorities. The judge heard Goldberg's counsel before deciding this motion on March 29, 1976. A trial judge does not need the benefit of briefs in opposition to a motion to evaluate the reasons set forth in a motion for recusal, to determine whether he has a substantial interest or is a material witness within the meaning of 28 U.S.C. §455. It is interesting to note that Goldberg never requested reargument of the motion on this or any other ground. To raise this point as an example of the judge's alleged "abuse of discretion" is to negate the possibility of discretion and judgment on the part of any district court when a motion for recusal is made.

Justice Rehnquist in Laird v. Tatum, 409 U.S. 824 (1972), discussed the question of recusal under 28 U.S.C. §455. In that case Justice Rehnquist found that none of the criteria of this statute requiring recusal applied to him. He further stated that:

> "Those federal courts of appeals that have considered the matter have unanimously concluded that a federal judge has a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified".

Justice Rehnquist cited the following cases on this point, Laird v. Tatum, supra at p. 837; Edwards v. United States 334, F. 2d 360, 362 n. 2 (5th Cir. 1964), cert. denied, 379 U.S. 1000 (1965); Tynan v. United States, 376 F.2d 761 (D.C. Cir.), cert. denied, 389 U.S. 845 (1967); In re Union Leader Corp., 292 F. 2d 381 (1st Cir.), cert. denied, 368 U.S. 927 (1961); Wolfson v. Palmieri, supra; Simmons v. United States, 302 F. 2d 71 (3d Cir. 1962); United States v. Hoffa, supra; Tucker v. Kerner, 186 F2d 79 (7th Cir. 1950); Walker v. Bishop, 408 F.2d 1378 (8th Cir. 1969).

Applying this principle to the present case the judge was duty-bound not to disqualify himself upon the legally insufficient grounds urged by Goldberg. See U.S. v. Scalafani, supra at 255; Rosen v. Sugarman, 357 F.2d 794, 797 (2d Cir. 1966); In re Union Leader Corp., supra at 391; Lazofsky v. Somerset Bus Co., supra at 1045; Cranston v. Freeman, supra at 816. This is

particularly true in light of the amount of judicial time which the trial court had spent on the settlement of the original action and the motions to dismiss Goldberg's counterclaims and cross-claims. To grant Goldberg's motion at this point would not be in accord with principles of judicial economy.

For the reasons stated above, the denial of Goldberg's motion for recusal was clearly not an abuse of discretion on the part of the trial judge and should be affirmed.

## CONCLUSION

The orders appealed from should be affirmed with costs.

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Respectfully submitted,

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